Supreme Court, U.S.
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No. 06-707

IN THE

Supreme Court of the United States

THE ALASKA CONSTITUTIONAL LEGAL DEFENSE CONSERVATION FUND, INC., *et al.*,

Petitioners,

v.

DIRK DEMPTHORNE, Secretary of the Interior, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Federal Subsistence Board Regulations which exclude subsistence hunting and fishing on all federal land in Alaska to all urban residents of Alaska violate the Public Trust Doctrine which requires all public land and resources thereon to be held in common trust for all the citizens of the United States.

2. Can the Federal Subsistence Board establish the priority of subsistence uses of federal land in Alaska by restricting the class of people who can use the federal land in the State of Alaska.

3. Do the regulations of the Federal Subsistence Board which excludes subsistence hunting and fishing on all federal lands in Alaska by urban residents of Alaska violate equal protection of the law.

LIST OF PARTIES

The parties are The Alaska Constitutional Legal Defense Conservation Fund, Inc., Dale Bonduarant, Warren Olson, Daniel a. Devereux; Shannon Farrah, James P. Jacobson, W. Tom Minter, Gary Younkin, Plaintiffs–Appellants, who consist of both Alaska residents and non-Alaska residents who are citizens of the United States.

The Defendants-Appellees are Dirk Kempthorn,[1] Secretary of the Interior, Mike Johanns, Secretary Department of Agriculture, Kathleen Clarke, Director Bureau of Land Management, Dale Bosworth, Chief of U.S. Forest Service, Thomas H. Boyd, Representative of the Federal Subsistence Board, Office of Subsistence Management, U.S. Fish and Wildlife Services, Steve Kessler, Regional Subsistence Program Leader, U.S. Forest Service, Alaska Region, United States of America.

In addition, the Alaska Federation of Natives appeared as *amicus curiae* in support of Defendant-Appellees.

CORPORATE DISCLOSURE STATEMENT

The Alaska Constitutional Legal Defense Conservation Fund, Inc., is a non-profit corporation existing under the laws of the state of Alaska, whose stated purpose is to guarantee the protection of Alaska's natural resources and to preserve them for all the people's common use.

---

1. Dirk Kempthorne has been substituted for his predecessor Gail Norton as the Secretary of the Interior.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was a memorandum filed August 22, 2006. The Ninth Circuit affirmed the judgment of the United States District Court for the District of Alaska, entered on August 19, 2005, after the filing of an order on the cross motions for summary judgment dated August 16, 2005. (*See*, Appendix A and B)

STATEMENT OF JURISDICTION

The court's jurisdiction is invoked under 28 U.S.C. § 1331 for violations of the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 1301, *et seq.*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV of the United States Constitution:

Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

16 U.S.C. § 3114. Preference for subsistence uses.

Except as otherwise provided in this Act and other federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes. Whenever it is necessary to restrict the taking of populations of fish and wildlife on such lands for subsistence uses in order to protect the continued viability of such populations, or to continue such uses, such priority shall be implemented through appropriate limitations based on the application of the following criteria:

(1) customary and direct dependence upon the populations as the mainstay of livelihood;

(2) local residency; and

(3) the availability of alternative resources.

16 U.S.C. § 3202. Taking of fish and wildlife.

(a) Responsibility and authority of the State of Alaska. Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands except as may be provided in subchapter II of this chapter, or to amend the Alaska constitution.

(b) Responsibility and authority of Secretary. Exempt as specifically provided otherwise by this Act, nothing in this Act is intended to enlarge or diminish the responsibility and authority of the Secretary over the management of public lands.

36 C.F.R. § 242.5, 50 C.F.R. § 100.5 Eligibility for subsistence use.

(a) You may take fish and wildlife on public lands for subsistence uses only if you are an Alaska resident of a rural area or rural community. The regulations in this part may further limit your qualifications to harvest fish or wildlife resources for subsistence uses. If you are not an Alaska resident or are a resident of a non-rural area or community listed in Sec. 242.23, you may not take fish or wildlife on public lands for subsistence uses under the regulations in this part.

(b) Where the Board has made a customary and traditional use determination regarding subsistence use of a specific fish stock or wildlife population, in accordance with, and as listed in, Sec. 242.24, only those Alaskans who are residents of a rural areas or communities designated by the Board are eligible for subsistence taking of that population or stock on public lands for subsistence uses under the regulations in this part. If you do not live in one of those areas of communities, you may not take fish or

wildlife from that population or stock, on public lands under the regulations in this part.

(c) Where customary and traditional use determinations for a fish stock or wildlife population within a specific area have not yet been made by the Board (*e.g.*, "no determination"), all Alaskans who are residents of rural areas or communities may harvest for subsistence from that stock or population under the regulations in this part.

(d) The National Park Service may regulate further the eligibility of those individuals qualified to engage in subsistence uses on National Park Service lands in accordance with specific authority in ANILCA, and National Park Service regulations at 36 CFR Part 13.

36 C.F.R. § 242.15, 50 C.F.R. § 100.15 Rural determination process.

(a) The Board shall determine if an area or community in Alaska is rural. In determining whether a specific area of Alaska is rural, the Board shall use the following guidelines:

(1) A community or area with a population of 2,500 or less shall be deemed to be rural unless such a community or area possesses significant characteristics of a non-

rural nature, or is considered to be socially and economically a part of an urbanized area.

(2) Communities or areas with populations above 2,500 but not more than 7,000 shall be determined to be rural or non-rural.

(3) A community with a population of more than 7,000 shall be presumed non-rural, unless such community or area possesses significant characteristics of a rural nature.

(4) Population data from the most recent census conducted by the United States Bureau of Census as updated by the Alaska Department of Labor shall be utilized in this process.

(5) Community or area characteristics shall be considered in evaluating a community's rural or non-rural status. The characteristics may include, but are not limited to:

(i) Use of fish and wildlife;

(ii) Development and diversity of the economy;

(iii) Community infrastructure;

(iv) Transportation; and

(v) Educational institutions.

(6) Communities or areas which are economically, socially, and communally integrated shall be considered in the aggregate.

(b) The Board shall periodically review rural determinations. Rural determinations shall be reviewed on a 10-year cycle, commencing with the publication of the year 2000 U.S. census. Rural determinations may be reviewed out-of-cycle in special circumstances. Once the Board makes a determination that a community has changed from rural to non-rural, a waiting period of 5 years shall be required before the non-rural determination becomes effective.

(c) Current determinations are listed as Sec. 242.23.

36 C.F.R. § 242.23, 50 C.F.R. § 100.23 Rural determinations.

(a) The Board has determined all communities and areas to be rural in accordance with Sec. 242.15 except the following:

Adak;

Fairbanks North Star Borough;

Homer area – including Homer, Anchor

Point, Kachemak City, and Fritz Creek;

Juneau area – including Kenai, Soldotna, Sterling, Nikiski, Salamatof, Kalifornsky, Kasilof, and Clam Gulch;

Ketchikan area – including Ketchikan City, Clover Pass, North Tongass Highway, Ketchikan East, Mountain Point, Herring Cove, Saxman East, Pennock Island and parts of Gravina Island;

Municipality of Anchorage;

Seward area – including Seward and Moose Pass, Valdez, and

Wasilla area – including Palmer, Wasilla, Sutton, Big Lake, Houston, and Bodenberg Butte.

You may obtain maps delineating the boundaries of Non-rural areas from the U.S. Fish and Wildlife Service.

STATEMENT OF THE CASE

Dale Bondurant was an Alaskan resident and was the President of Alaska Constitutional Legal Defense Conservation Fund, Inc. (hereinafter referred to as "The Conservation Fund"). He resided in Soldotna, Alaska, and had been a resident of Alaska for the past fifty years. Dale Bondurant had hunted and fished all his life. He died on October 25, 2006.

The Conservation Fund is a non-profit corporation existing under the laws of Alaska. This corporation is made up of individuals who have an interest in outdoor activities, and are fishermen and hunters who believe in the wise use of Alaska's natural resources. The Conservation Fund has over 60 members who come from all over Alaska and out of state. The Conservation Fund is a public interest group. Its purpose is to guarantee the protection of Alaska's natural resources and to preserve them for all the people's common use without special privilege to any one group within the State of Alaska and the nation as a whole. It places particular emphasis on the maintenance of Alaska's fish and wildlife resources and their uses, and continued access to public lands. It is committed to the preservation of critical habitat, assurance of access to and use of public resources, dedication to the education of the public as to renewable resource management, and participation in regulatory, legislative, administrative, and judicial policy decision affecting Alaska's natural resources and their uses.

Warren Olson is an Alaskan resident. He currently resides in Anchorage, Alaska, and has been a resident of Alaska for the past forty-five years. Warren Olson is the Secretary/ Treasurer of the Conservation Fund, and receives the

correspondence and acts as the registered agent for the Conservation Fund at his address in Anchorage, Alaska. He has participated in the harvest of renewable resources from nearly all areas on a personal basis. He can no longer participate in subsistence harvesting of renewable resources in the State of Alaska on federal lands because of his residence.

Dale Bondurant and Warren Olson hold hunting and fishing licenses from the State of Alaska permitting them to hunt and fish on all state lands and waters in Alaska open to hunting and fishing.

James P. Jacobson is an Alaskan resident. He currently resides in Kodiak, Alaska. Mr. Jacobson is a licensed hunting guide in the State of Alaska. Mr. Jacobson arranges guided hunts on lands open to hunting. Due to federal involvement, Mr. Jacobson has had to cancel pre-booked guided hunts as the state issued permits were unilaterally restricted by the federal Subsistence Board. Mr. Jacobson has participated in the harvest of Alaska's natural resources and has been a member of the Fish and Game Advisory Committee. Mr. Jacobson's livelihood has been significantly impacted by the implementation of Title VIII of ANILCA with respect to Game Unit 23 and elsewhere in Alaska.

Daniel W. Devereux is an Alaskan resident. He currently resides in Anchorage, Alaska. Mr. Devereux applied for and was awarded a sheep hunting permit (hunt no. DS3854) by the State of Alaska for Game Unit 23 for the 1998 season. Mr. Devereux's hunting permit was rendered void by the Federal Subsistence Regional Advisory Council and therefore the Federal Subsistence Board on August 4, 1998. Mr. Devereux was denied participation in the season which

began August 10, 1998 and went through September 20, 1998 on federal lands, Unit 23.

Shannon Farrah resides in Tucson, Arizona, and has applied for and received an Alaska non-resident hunting license no. 8010260 in 1998. Ms. Farrah applied for and was awarded a sheep-hunting permit (no. 0007, hunt DS384) by the State of Alaska for Game Unit 23 for the 1998 season. Ms. Farrah's hunting permit was rendered void by the Regional Advisory Council and therefore the Federal Subsistence Board on August 4, 1998. Ms. Farrah was denied participation in the season, which began August 10, 1998 on federal lands, Unit 23, and went through September 20, 1998, and is forever barred from hunting on federal lands designated for subsistence in Alaska as a non-resident of Alaska.

Tom Minter resides in Oviedo, Florida, and has applied for and received an Alaska non-resident hunting license no. 8010257 in 1998. Mr. Minter applied for and was awarded a sheep-hunting permit (no. 0004, hunt DS384) by the State of Alaska for Game Unite 23 for the 1998 season. Mr. Minter's hunting permit was rendered void by the Regional Advisory Council and therefore the Federal Subsistence Board on August 4, 1998. Mr. Minter was denied participation in the season which began August 10, 1998 on federal lands, Unit 23, and went through September 20, 1998. Mr. Minter is now barred from hunting on federal lands in Alaska designated for subsistence as a non-resident of Alaska.

Gary Younkin resides in Hume, Virginia and had applied for and received an Alaska non-resident hunting license no 8010261 in 1998. Mr. Younkin applied for and was awarded a sheep-hunting permit (no. 0002, hunt DS384) by the State of Alaska for Game Unit 23 for the 1998 season.

Mr. Younkin's hunting permit was rendered void by the Regional Advisory Council and therefore the Federal Subsistence Board on August 4, 1998. Mr. Younkin was denied participation in the season which began August 10, 1998 on federal lands, Unit 23 and went through September 20, 1998. Mr. Younkin is now barred from hunting on federal lands designated for subsistence in Alaska as a non-resident of Alaska.

Dale Bondurant, Warren Olson, and James P. Jacobson have all applied to the United States Department of the Interior and other federal authorities in Alaska to hunt and fish on federal public lands and in State of Alaska sovereign waters; in those areas restricted to "subsistence" hunting and fishing by only "rural' residents. James P. Jacobson, a resident of "rural" Alaska, applied for a subsistence sheep permit for GMU 23 in August, 1998.

The United States Department of the Interior denied Dale Bondurant and Warren Olson permits to hunt and fish on federal land and waters because they are classified as "urban residents" of Alaska under ANILCA and its regulations. James P. Jacobson was denied his sheep-hunting permit by David Spirtes, Superintendent of the National Parks Service stating that although he was a resident of "rural" Alaska, he was not a resident of GMU 23.

Plaintiffs Bondurant and Olson appealed the denial of their permits to federal regulatory offices in Alaska under the control of the Department of Interior and the Department of Agriculture, but the denials were affirmed.

Federal regulations concerning hunting and fishing on federal lands in Alaska, effective July 1, 1990 (under

regulations promulgated July 1, 1990) contain prohibitions against hunting and fishing by "urban" classified residents, which have and will deny Plaintiffs the right to hunt and fish on federal lands and waters in Alaska in the future.

Plaintiffs maintain that such statues and regulations restricting the right of urban residents to hunt and fish on federal public land and State sovereign waters in Alaska are unconstitutional as applied and are in violation of their rights as citizens of the United States and as residents of Alaska.

Defendants are: (1) the United States; (2) Dirk Kempthorn (successor to Gail Norton), in his official capacity as Secretary of the Department of Interior, who maintains the principal responsibility for the enactment and application of the rules and regulations referenced above. (3) Mike Johanns, in his official capacity as Secretary Department of Agriculture, (4) Kathleen Clarke, in her official capacity as Director Bureau of Land Management; (5) Dale Bosworth, in his official capacity as Chief of U.S. Forest Service; (6) Thomas H. Boyd, in his official capacity as Representative of the Federal Subsistence Board, Office of Subsistence Management, U.S. Fish and Wildlife Services; (7) Steve Kessler, in his official capacity as Regional Subsistence Program Leader, U.S. Forest Service, Alaska Region, United States of America.

REASONS FOR GRANTING THE PETITION

1. Neither the federal government nor the state governments can claim supremacy to avoid the Public Trust Principle. However, the United States District Courts and the United States Circuit Courts of Appeals appear to be completely confused on the application of the "Public Trust

Doctrine" and the enforcement thereof by states. The District Court for Alaska appears to hold that no citizens can invoke the Doctrine while other United States District Courts invoke the "Public Trust Doctrine" to determine wildlife issues and coastal zone management issues as well as ownership interests in tidelands, etc.

The management of fish and game is traditionally left to the states under their sovereign police powers. The incursions by the federal government are strictly limited in this area. The expansion of such federal power over fish and game under ANILCA, which applies solely to Alaska, completely affects all U.S. Courts in the interpretation of the law under our system of dual sovereignty. If it does not apply the court should say so. If it does apply, the court should say so. More than 80% of the states have adopted and applied the Public Trust Doctrine. *See,* Coastal States Organization, Inc., *Putting the Public Trust Doctrine to Work* (2nd Ed) p. 278-280 (1997).

2. The equal protection clause of the U.S. Constitution guarantees equal treatment under the law. The location of one's residence should not dictate the benefit a citizen receives or what he is entitled to. The court should make it clear that the exclusions of one group of citizens to give advantage to another is improper.

I. THE PUBLIC TRUST DOCTRINE PROHIBITS THE REGULATIONS HEREIN.

The Public Trust Doctrine has its inception in early English common law with origins from Roman, Greek, French, German and English law. *See* Blackstone Commentaries 1, 12, 14-15, 2 Kent, Commentaries 348-349.

The history of common ownership of fish and game is discussed in *Geer v. Connecticut*, 161 U.S. 519, 522, 40 L.Ed. 793, 794 (1896)

> . . . While the fundamental principles upon which the common property in game rest have undergone no change, the development of free institutions had led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the state, as held by this court in *Martin v. Waddell*, 16 pet. at 410, represents its people, and the ownership is that of the people in their united sovereignty. . . .

Id. at 524.

In *Shively v. Bowlby*, 152 U.S. 1, 19-26 (1894) the United States Supreme Court described the Public Trust Doctrine in the 13 original states its application to the people therein. Each state determined the extent of the doctrine but all had to honor the fundamental basics of navigation, commerce and fishing without government interference.

While the holding of the case was reversed in *Hughes v. Oklahoma*, 441 U.S. 322 (1979), the Public Trust Doctrine was not repudiated by the Court. The Court stated that the general rule adopted in the case "makes ample allowance for preserving, in ways not inconsistent with the Commerce

Clause, the legitimate state concerns for conservation and protection of wild animals underlying the 19th century legal fiction of state ownership." *Id.* at 335-36, 60 L.Ed.2d at 261.

As one U.S District Court noted in a post-*Hughes* case:

> Under the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the people.

In Re Steuart Transportation Co., 495 F.Supp. 38, 40 (E.D. Va 1980)

The Supreme Court had recognized the doctrine in an early case in 1855, after the State of Maryland seized a federally licensed vessel for violating a state law intended to prevent destruction of the oyster population in state waters. *Smith v. Maryland*, 59 U.S. 71 (1855). Considering whether the statute was repugnant to the federal government's overriding constitutional authorities, the Court connected the law's validity to the State's title to the submerged land. The soil below low-water mark "is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well as shellfish as floating fish * * *." *Id.* at 74-75. "The State holds propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery * * *." *Id.* Authority over fisheries derives from the title that States obtain under the equal footing doctrine: "[t]his power results from the ownership

of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpaired those public uses for which the soil is held." *Id.*

Sovereign ownership of submerged lands is based on the belief that the public interest in fishing, navigation, and commerce is greater than the sum of private interests, and that, as local sovereign, the state is responsible for protecting that interest. "The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them * * * than it can abdicate its police powers in the administration of government and the preservation of the peace." *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387, 453 (1892). Congress reaffirmed these principles in the Submerged Lands Act, providing that States have "the right and power to manage * * * natural resources" along navigable waters, including "fish." 43 U.S.C. §§ 1311, 1301(e).

Fisheries management is a traditional state authority through which a "State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). According to the Supreme Court, "the state * * * has power to control the game and fish within its borders * * * in its sovereign capacity as representative of the people." *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 11 (1928). States have "important interests in regulating wildlife and natural resources within their borders," *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999). The Court recognizes "the importance to its people that a State have power to preserve and regulate the exploitation of an importance resource." *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977). It considers "the States' interest in conservation and protection of wild animals as legitimate local purposes

similar to the States' interest in protecting the health and safety of their citizens." *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

Indeed, control over the fisheries resource was one of the reasons Alaskans wished to form a State. Alaskans wanted the "pitifully depleted" salmon stocks, *Metlakatla Indian Community v. Egan*, 362 P.2d 901, 915 (1961), *vacated on other grounds*, 369 U.S. 45 (1962), *aff'd sub nom. Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), to be managed locally, to repair the "evils of overexploitation" of the salmon by "'Stateside' colonialism." *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 47 (1962).

During territorial days when Alaska's fisheries were regulated by the federal government, Alaskans became alarmed by the devastating efficiency of fish traps owned by politically powerful outside commercial fishing interests. *See* Gerald E. Bowkett, *Reaching for a Star: the Final Campaign for Alaska Statehood* 12-13 (1989). In 1913, the first session of the Alaska Territorial Legislature asked Congress for legislation to limit the fishing efficiency of the trap, and continued to do so regularly thereafter. *Metlakatla*, 362 P.2d at 905. Alaskans also voted overwhelmingly to abolish fish traps in a referendum in 1948. *Id.* As a territory, Alaska had no power to stop the traps' devastation. But in 1956, without a statehood act, Alaskans drafted a constitution. With the hope that they might soon be a State in control of preservation, Alaskan voters approved the proposed constitution along with an ordinance to abolish commercial traps, which the first State legislature converted to a statute immediately after statehood. *Id.*

Reflecting the deep-seated desire of Alaskans to control their own resources, the Alaska Constitution included a number of provisions relating to state management of fisheries and waters. "In adopting their constitution, the people of Alaska have very clearly constituted the state as owner of the natural resources * * *." *Greisen v. United States,* 831 F.2d 916, 918 (9th Cir. 1987). For example, the Alaska Constitution provides that "[w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." Alaska Const. art. VIII, § 3. This provision "constitutionalize[s] historic common law principles governing the sovereign's authority over management of fish, wildlife, and water resources of the state for the benefit of all the people." *Id.*

The Alaska Constitution also requires the State to regulate the harvest responsibly. "Fish * * * and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses." Alaska Const. Art. VIII § 4. The "migrating schools of fish, while in inland waters, are the property of the state, held in trust for the benefit of all the people of the state, and the obligation and authority to equitably and wisely regulate the harvest is that of the state." *Metlakatla,* 362 P.2d at 915; *see also* Alaska Const. art. 8, § 2 ("The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters for the maximum benefit of its people.")

The regulations of the Federal Subsistence Board simply exclude a substantial portion of the citizens of Alaska and all other citizens of the United States outside Alaska from consideration for use of all fish and game on public lands

which is held in trust for all citizens of Alaska and the United States.

The Ninth Circuit Court of Appeals Opinion incorrectly states that the Appellants had conceded the legal issue of Public Trust. (Appendix A) The United States District Court for Alaska specifically ruled that Appellants could not assert the Public Trust Doctrine in a decision for partial summary judgment on the motion to accept the amended complaint on March 4, 2004. (*See* Appendix C, pages 8 and 9); and the issue was argued to the Ninth Circuit Court of Appeals.

II. THE REGULATIONS RESTRICTING USERS ON FEDERAL LAND VIOLATE EQUAL PROTECTION OF THE LAWS OF ALASKA AND UNITED STATES CITIZENS.

The Ninth Circuit affirmed the decision of the United States District Court for the District of Alaska that the regulations of the Federal Subsistence Board established pursuant to ANILCA, (which applies solely to Alaska) were properly adopted even through these regulations exclude all urban residents of Alaska from subsistence hunting and fishing on all federal land in Alaska. The Board found that in order to establish a rural preference on federal lands in Alaska for subsistence hunting and fishing in Alaska that all urban residents had to be excluded from subsistence hunting or fishing on federal lands in Alaska.

The diagram at Appendix D of federal land in Alaska shows the definition of "rural" and "urban" to be illusory as a classification of users. (*See*, Appendix D – Map. Alaska's National Parks, Monuments and Preserves, Norris "Alaska Subsistence (National Park Service, 2004).

The Fifth Amendment of the United States Constitution and the Fourteenth Amendment of the United States Constitution provide for due process of law and equal protection of the law to all citizens of the United States. Here the yearly regulation denying all urban residents of Alaska and all non-Alaska citizens the right to subsistence hunt or fish on federal public land in Alaska violates those equal protection principles.

Fish and wildlife may be managed for designated preferences among *uses*, but equal protection mandates an equality among the *users*. Federal public lands are reserved for specific purposes (uses). For example, the Kenai National Wildlife Refuge's primary purposes are managed for fish, wildlife and recreation (uses), but these resources must be available for taking on the basis of equal consideration among all people using those resources (users). Public land ownership, whether state or federal, sets up the purposes (or uses) for which those lands are reserved. After beneficial uses are selected, the state then utilizes its police powers to regulate the users, or the beneficiaries, of the common public trust property (fish, wildlife and water resources) on both federal and state land.

Kleppe v. State of New Mexico, 426 U.S. 529, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976), is often cited by proponents of federal management over what was traditionally managed under state police power. However, this decision, in fact, recognizes the Secretary of the Interior's responsibility to decide preferences among resource uses that are compatible with the purpose for which they were reserved. The decision neither implicitly nor explicitly attempts to establish a preference of users for those uses. No effort was made by

the Supreme Court to designate any preference of users for the identified uses whatsoever.

If one looks to ANILCA for a clear understanding of the term rural residency, the nearest attempt at a definition is the phrase "customary and traditional." Unfortunately, the terms within that phrase, *i.e.*, "custom" and "traditions" have been defined either broadly or narrowly depending upon the various perspectives of the courts which have done so. The court's struggle with this ambiguous phrase is reflected in the Alaska Supreme Court's statement: "Despite repeated legal challenges to and multiple revisions of the subsistence laws, 'subsistence uses' have long been defined in terms of 'customary and traditional uses'; accordingly, we consistently have interpreted[2] customary and traditional to refer to *'uses'* rather than *'users'*."

Again, the section in ANILCA following the rural preference section, Section 804, clearly signals that a survey of wildlife is constantly to take place and yearly reports are to be made to gauge the quantity of game and to arrange subsistence activity based on the total resource. No one argues that the entire stock of game on federal land cannot be used for "subsistence" – that is regulation of use. However, the exclusion of all urban hunters of Alaska or non-Alaskan U.S. citizen hunters has nothing to do with subsistence use or the evaluation of the game stocks, it is an impermissible regulations of users. (16 U.S.C. § 3115)

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2. *Payton v. Alaska*, 938 P.2d 1036, 1042 (Alaska 1997). (The Supreme Court did not remand this case to the Superior Court, but instead ordered the Board of Fisheries to grant the Paytons their right to participate as equal users in the subsistence fisheries.)

The 9th Circuit erred when it ruled that the regulations excluding "urban" hunters were rationally related to a rural preference. This is particularly true where the "rural" designation in Alaska is based on the local government units which are in close proximity to the excluded "urban" area.

III. THE CONSTITUTIONAL POWER OF REGULATION OF FEDERAL LAND DOES NOT RESTRICT THE RIGHTS OF CITIZENS.

When Congress manages federal property, its authority comes from the Property Clause to the U.S. Constitution.[3] The federal government claims in this action that because the property clause gives Congress the power to make "needful rules" and "regulations" respecting federal lands, then (a) *any* action taken by Congress by virtue of that Clause with respect to federal lands is valid, (b) Congress has unlimited power over the administration of public lands, and (c) normal constitutional constraints are not effective against such rules. Hence, they claim, Congress can, by virtue of the property clause, grant the Secretary of the Department of the Interior the power to *regulate* wildlife harvest on federal public lands in Alaska and to *regulate* fish harvest in certain (if not all) of Alaska's navigable waters simply by passing an act authorizing those actions.

A similar argument was presented to the U.S. Supreme Court in *Kansas v. Colorado*, 206 U.S. 46, 27 S.Ct. 655, 51 L.Ed 956 (1907), but held untenable. The Court held that

3. U.S. Constitution, Art. IV, §3 "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state."

the Tenth Amendment constrains Congress, even when Congress acts under the property clause. *Id.* 206 U.S. at 90. Furthermore, Congress cannot act outside the enumerated powers granted by Article I, Section 8 of the United States Constitution. Therefore, since fish and wildlife are not federal property[4] and the navigable waters are not federal property, the property clause does not authorize this type of management of Alaska's fisheries or wild game.

The property clause very clearly bans any action prejudicing the rights or claims of any individual state. The Tenth Amendment clearly reserves to the people those powers not granted to Congress. It is settled law that, when it comes to internal affairs, the states retained their police power.[5]

Management and regulation of fish and wild game is a universally recognized police power belonging to the states. The "rural" allocation scheme now implemented by the federal government utilizing ANILCA violates Alaska's broad trustee powers and police powers over its wild animals on federal lands within state boundaries. The State of Alaska, not the federal government, has trust title to and regulates the harvest of wild animals on federal lands within its boundaries.

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4. The rule of law which all American courts have recognized is that wild game are owned, to the fullest extent that any wild animal may be owned, by the states in their sovereign capacity as the representatives and for the benefit of all their people in common. *See, United States v. Shauver,* 214 F. 154 (E.D. Ark. 1914); *State v. Hume,* 52 Or. 1, 5, 95 Pac. 808, 810 (1908).

5. *Kleppe v. New Mexico,* 426 U.S. 529, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976).

ANILCA was adopted for Alaska "in recognition of the unique conditions in Alaska." 16 U.S.C. § 3203. 16 U.S.C. § 3202 specifically provides that "Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands. . ."

Thus whether or not the property clause is being properly followed by the United States herein, it does not provide a legal basis to exclude Plaintiffs from subsistence hunting and fishing on federal lands in Alaska.

The United States Constitution does not make a general grant of legislative power, it reads: "Article 1, § 1. All legislative powers herein granted shall be vested in a Congress. . ." And then, in Article VIII, § 1 it mentions and defines the legislative powers that are granted. Because there is no general grant of legislative power it has become an accepted constitutional rule that the federal government is a government of enumerated (not unlimited) powers.[6] Therefore, Congress claims a legislative power, even when it applies to public lands, the question is whether or not that power is one of those granted by the Constitution. The allocation of Alaska's fish and wildlife to a special class based on location of their residence is *not* one of the powers granted to Congress by the Constitution.

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6. *See, M'culloch v. Maryland,* 17 U.S. 316, 4 Wheat. 403, 4 L.Ed. 579, 601 (1819) ("This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it seems too apparent to have required to be enforced by all those arguments which its enlightened friends ... found it necessary to urge. The principle is now universally admitted").

Alaska, on an equal footing with the other states, has the power to regulate, control, or prohibit the hunting and killing of fish and wild game within its sovereign boundaries.[7] The federal government does not have any enumerated power under the U.S. Constitution to interfere in Alaska's internal affairs.[8] This local power has recently been reaffirmed by the United States Congress in May of 2005 with the passage of House Bill 1268, the "Emergency Supplemental Appropriation Action for Defense, the Global War on Terror, and Tsunami Relief, 2005", which provides as follows in Section 6063(b)(1):

> It is the policy of Congress that it is in the public interest for each State to continue to regulate the taking for any purpose of fish and wildlife within its boundaries, including by means of laws or regulations that differentiate between residents and non residents of such State with respect to the availability of licenses or permits for taking of particular species of fish or wildlife, the kind and numbers of fish and wildlife that may be taken, or the fees charged in connection with the issuance of licenses or permits for nonresidents.

House Bill 1268 § 6063(b)(1).

The rulemaking power granted to an administrative agency charged with the administration of a federal statute

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7. *See, Kleppe v. New Mexico*, 426 U.S. at 545 (1976) (No doubt it is true that as between a state and its inhabitants the state may regulate the killing . . . of [wildlife].

8. *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491, 502 (1970); *See also, Martin v. Lessee of Waddell*, 41 U.S. 367, 16 Pet. 367, 367-369, 10 L.Ed. 997 (1842).

is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-214 (1976).

Title VIII of ANILCA as adopted by Congress does not exclude people. Its intent is to create priorities of uses of fish and game for residents of Alaska and the United States.

The regulations herein make no attempt to protect or prioritize the existing stock of fish and/or game in excluding "urban" residents. This clearly exceeds the statute granting the right to adopt regulations to carry out the purpose of ANILCA.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AUGUST 22, 2006

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-35922
D.C. No. CV-00-00167-A-HRH

MEMORANDUM*

ALASKA CONSTITUTIONAL LEGAL DEFENSE CONSERVATION FUND, INC.; DALE BONDURANT; WARREN OLSON; DANIEL A. DEVEREUX; SHANNON FARRAH; JAMES P. JACOBSON; W. TOM MINTER; GARY YOUNKIN,

Plaintiffs - Appellants,

v.

DIRK KEMPTHORNE,** Secretary of the Interior; MIKE JOHANNS, Secretary Department of Agriculture; KAATHLEEN CLARKE, Director Bureau of Land Management; DALE BOSWORTH, Chief of U.S. Forest Service; THOMAS H. BOYD, Representative of the Federal

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** Dirk Kempthorne has been substituted for his predecessor as Secretary of the Interior. Fed. R.App. P. 43(c)(2).

Appendix A

Subsistence Board, Office of Subsistence Management, U.S. Fish and Wildlife Services; STEVE KESSLER, Regional Subsistence Program Leader, U.S. Forest Service, Alaska Region; UNITED STATES OF AMERICA,

Defendants - Appellees,

ALASKA FEDERATION OF NATIVES,

Defendant-intervenor - Appellee.

Appeal from the United States District Court
for the District of Alaska
H. Russel Holland, Chief Judge, Presiding

Argued and Submitted July 25, 2006
Anchorage, Alaska

Before KOZINSKI, BERZON, and TALLMAN, Circuit Judges.

The district court properly concluded that the Plaintiffs' challenge to the Federal Subsistence Board's ("Board") regulation granting rural Alaskans priority for subsistence hunting constituted an "as-applied" challenge not barred by the statute of limitation. *See Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991).

The Board acted within its statutory authority under the Alaska National Interest Lands Conservation Act ("ANILCA") by enacting 50 C.F.R. § 100.5, which grants a preference for subsistence hunting to rural Alaskans.

Congress intended to protect the subsistence way of life for Native and non-Native rural Alaskans. *See* 16 U.S.C. §§ 3111(1), (4). Even if the preference is not explicitly provided for under Title VIII of ANILCA, the Board's interpretation of the statute was reasonable. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 843-844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Nor does the preference violate the Equal Protection Clause. The classification must satisfy only rational basis review as it involves neither a suspect class nor a fundamental right. *See Nordlinger v. Hahn,* 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992). The preference for rural Alaskans serves a legitimate government interest. Congress sought to provide continued "opportunity for subsistence uses by rural residents of Alaska" in order to preserve the "Native physical, economic, traditional, and cultural existence" and the "non-Native physical, economic, traditional, and social existence." 16 U.S.C. § 3111(1); *see also Nordlingler,* 505 U.S. at 11 (stating that the "Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification"). Moreover, limiting participation in subsistence hunting to only rural Alaskans is rationally related to Congress's legitimate interest. In conserving Alaska's finite natural resources, Congress has made some progress in preserving the ability of rural Alaskans to rely on subsistence hunting.

The priority is also a proper exercise of congressional power under the Property Clause in that it is necessary to protect rural inhabitants of Alaska who rely on wildlife living on public lands as a source of food and commerce. *See Kleppe v. New Mexico,* 426 U.S. 529, 539, 96 S.Ct. 2285, 49 L.Ed.2d

34 (1976) ("[T]he [Property] Clause, in broad terms, gives Congress the power to determine what are 'needful' rules 'respecting' the public lands.").

The Plaintiffs conceded in the district court that the Public Trust Doctrine is currently applicable only to states. Because they provide no support for extending this doctrine to the federal government, the district court properly dismissed this claim.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA FILED AUGUST 18, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

No. A00-0167-CV (HRH)

THE ALASKA CONSTITUTIONAL LEGAL DEFENSE CONSERVATION FUND, INC. et al.,

Plaintiffs,

vs.

GALE NORTON, Secretary of the Interior, et al.,

Defendants.

ORDER

Motions for Summary Judgment

Plaintiffs move for summary judgment.[1] This motion is opposed,[2] and defendants and intervenor cross-move for summary judgment.[3] Oral argument has been requested but is not deemed necessary.

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1. Clerk's Docket No. 86.

2. Clerk's Docket Nos. 88, 91, 104, and 108.

3. Clerk's Docket Nos. 103 and 107.

Appendix B

Facts

Plaintiffs are The Alaska Constitutional Legal Defense Conservation Fund, Inc.; Dale Bondurant; Warren Olson; Daniel A. Devereux; Shannon Farrah; James P. Jacobson; W. Tom Minter; and Gary Younkin. Defendants are the United States; Gail Norton, Secretary of the Department of Interior; Mike Johanns, Secretary of the Department of Agriculture;[4] Kathleen Clark, Director of the Bureau of Land Management; Dale Bosworth, Chief of the United States Forest Service; Thomas H. Boyd, Assistant Regional Director of Subsistence for the Department of Interior; and Steve Kessler, Regional Subsistence Program Leader for the United States Forest Service.[5] Intervenor is the Alaska Federation of Natives.

This case arises out of defendants' implementation of the rural preference for subsistence hunting and fishing on Federal lands found in Title VIII of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), 16 U.S.C. §§ 3101-26. ANILCA establishes a preference for customary and traditional uses of fish and wildlife by according a priority for the taking of fish and wildlife on federal public lands in Alaska for non-wasteful subsistence uses by rural Alaska residents. 16 U.S.C. § 3114.

Plaintiffs commenced this action on June 6, 2000, alleging that they have been denied hunting and fishing

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4. Mike Johanns is substituted for Ann Veneman pursuant to Rule 25(d)(1), Federal Rules of Civil Procedure.

5. Steve Kessler is substituted for Ken Thompson pursuant to Rule 25(d) (1), Federal Rules of Civil Procedure.

opportunities on federal public lands because they are not rural residents of Alaska. Plaintiffs are either urban residents of Alaska or non-residents of Alaska. Plaintiffs' second amended complaint alleges two counts: 1) "The Regulations of ANILCA Unconstitutionally Discriminate[] – Violations of the Fifth Amendment"[6] and 2) "Challenges to Specific Acts of Defendants Pursuant to the A.P.A."[7] Several portions of both counts have been dismissed through prior motion practice.

In June of 2004, plaintiffs agreed to file a motion for summary judgment in which they would identify and present "all of the remaining claims they wish to present under Counts One and Two of their Second Amended Complaint for Declaratory Judgment and Injunctive Relief."[8] Plaintiffs thereafter filed the instant motion for summary judgment. The court's initial review of plaintiffs' motion for summary judgment, and the oppositions thereto, revealed that further development of the case was necessary. The court ordered plaintiffs to serve and file appropriate affidavits which demonstrated plaintiffs' standing to bring their claims.[9] Plaintiffs were also ordered to "identify with particularity the regulatory acts which they claim to have adversely and

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6. Second Amended Complaint at 10, Clerk's Docket No. 57.

7. *Id.* at 13.

8. Stipulation (June 4, 2004) at 3, Clerk's Docket No. 85.

9. Order re Case Status (Feb. 17, 2005) at 4-5, Clerk's Docket No. 94.

unlawfully impacted them."[10] In the February 17, 2005 case status order, the court also raised the possibility of cross-motions for summary judgment by defendants and intervenor.[11] In a subsequent order, the court clarified its position on potential cross-motions, noting that "it ha[d] often expressed the view that cross-motions for summary judgment are unnecessary in Administrative Procedure Act appeals" but that because defendants and intervenor had asserted affirmative defenses and the parties seemed to be in agreement that the case would be decided on legal issues, the court would entertain cross-motions.[12]

Plaintiffs submitted affidavits demonstrating their standing to bring their claims, and defendants and intervenor no long oppose plaintiffs' motion for summary judgment on standing grounds.[13] Plaintiffs have also identified the specific regulations and regulatory actions that they are challenging as follows:

1) 36 C.F.R. § 242.23, 50 C.F.R. § 100.5;

2) 36 C.F.R. § 242.5, 50 C.F.R. § 100.15;

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10. *Id.* at 5.

11. *Id.*

12. Order re Case Status (April 12, 2005) at 2, Clerk's Docket No. 102.

13. *See* Defendants' Supplemental Brief in Opposition to Plaintiffs' Motion for Summary Judgment at 4-5, Clerk's Docket No. 104 and Defendant-Intervenor's Supplemental Brief in Opposition to Plaintiffs' Motion for Summary Judgment at 4, Clerk's Docket No. 108.

Appendix B

3) 36 C.F.R. § 242.15, 50 C.F.R. § 100.23;[14]

4) 63 Federal Register 43990 - August 17, 1998;

5) 64 Federal Register 49278 - September 10, 1999;

6) 65 Federal Register 5197 - February 2, 2000;

7) 66 Federal Register 45082 - August 27, 2001;

8) 67 Federal Register 50619 - August 5, 2002;

9) 68 Federal Register 49734 - August 19, 2003;

10) 69 Federal Register 53023 - August 31, 2004.[15]

Plaintiffs contend that

> these actions are unlawful only because they operate to limit the Federal subsistence use

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14. The Federal subsistence management regulations are published both at 36 C.F.R. Part 242 and 50 C.F.R. Part 100. Hereinafter, this order will cite only to the version of the regulations found at 50 C.F.R. Part 100.

15. Plaintiffs' Supplemental Memorandum at 1-2, Clerk's Docket No. 97, as corrected by Joint Status Report at 1-2, Clerk's Docket No. 101.

> priority to rural Alaska residents and create a process and establish criteria to identify who is a rural Alaska resident. Plaintiffs are not contending that any specific rural or non-rural determination or any specific season or bag limit, or any specific criteria for determining who is a rural Alaska resident is unlawful.[16]

Defendants and intervenor have filed separate cross-motions for summary judgment, seeking dismissal of plaintiffs' second amended complaint in its entirety. All supplemental briefing on the pending cross-motions for summary judgment is complete and the cross-motions are ready for disposition.

Discussion

Plaintiffs' claims arise under the Administrative Procedure Act (APA). 5 U.S.C. §§ 701-06. The scope of the court's review of agency action is determined by section 706 of the APA, which provides that the court shall

> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

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16. Joint Status Report at 2, Clerk's Docket No. 101.

> (B) contrary to constitutional right, power, privilege, or immunity; [or]
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. . . .

5 U.S.C. § 706.

First, defendants and intervenor argue that the seven regulatory actions set forth in the Federal Register to which plaintiffs cite are all proposed rules and thus are not subject to judicial review. Under the APA, the court's jurisdiction is limited to the review of final agency action. 5 U.S.C. § 704. In order for agency action to be final for purposes of judicial review, "the action must mark the 'consummation of the agency's decision-making process,' and must 'be one by which rights or obligations have been determined, or from which legal consequences will flow.'" *Alaska Dept of Envtl. Conservation v. EPA*, 244 F.3d 748, 750 (9th Cir. 2001) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).

The seven Federal Register citations submitted by plaintiffs all pertain to proposed rules. The court lacks jurisdiction over plaintiffs' challenges to these seven regulatory actions because they are not final agency actions. Plaintiffs' claims based on the seven regulatory actions are dismissed.

Second, defendants argue that any challenge to the three final regulations cited by plaintiffs is barred by the statute of

limitations.[17] The three regulations being challenged by plaintiffs are 50 C.F.R. §§ 100.5, 100.15 and 100.23. Section 100.5 is entitled "Eligibility for subsistence use" and provides that "[y]ou may take fish and wildlife on public lands for subsistence uses only if you are an Alaska resident of a rural area or rural community." 50 C.F.R. § 100.5(a). Section 100.5 also specifies who may take fish and wildlife for subsistence use if a customary and traditional use determination has been made. In that instance, "only those Alaskans who are residents of rural areas or communities designated by the Board are eligible for subsistence taking of that population or stock on public lands for subsistence uses under the regulations in this part." *Id.* at § 100.5(b). Subsection (c) of section 100.5 provides that if no customary and traditional use determination has been made, then "all Alaskans who are residents of rural areas or communities may harvest for subsistence from that stock or population under the regulations in this part." 50 C.F.R. § 100.15 delegates to the Federal Subsistence Board the authority to determine "if an area or community in Alaska is rural." The regulation sets forth the specific criteria the Board must use to make rural determinations. The regulation also requires the Board to review rural determinations on a 10-year cycle. 50 C.F.R. § 100.15(b). The current rural determinations are listed at 50 C.F.R. § 100.23, which is the third regulation challenged by plaintiffs.

Defendants argue that any challenge to these regulations is governed by the six-year statute of limitations found in

17. Intervenor does not agree that plaintiffs' claims are barred by the statute of limitations. Intervenor urges the court to decide plaintiffs' claims as to the three regulations on the merits.

28 U.S.C. § 2401(a). Section 2401(a) provides that civil actions against the United States are barred "unless the complaint is filed within six years after the right of action first accrues." The three challenged regulations were first promulgated on May 29, 1992. Although defendants concede that the regulations have since been republished or have had changes to them proposed, defendants argue that the regulations have undergone no substantive changes since 1992. Thus, defendants argue that any challenge to these regulations had to have been made within six years of May 29, 1992. Because plaintiffs filed this action in 2000, their challenge to these regulations, according to defendants, comes too late.

In the Ninth Circuit, if "a challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger." *Wind River Mining Corp. v. United States,* 946 F.2d 710, 715 (9th Cir. 1991). "The challenge must be brought within six years of the agency's application of the disputed decision to the challenger." *Id.* at 716. Here, plaintiffs primarily complain about how the regulations were applied to them in 1997, 1998, and 1999. Because plaintiffs brought their complaint within six years of the regulations being applied to them, their claims based on the three regulations are not barred by the statute of limitations.

Turning then to the merits of plaintiffs' challenge to the three regulations, plaintiffs did not submit any supplemental briefing in which they explain why these regulations are

unlawful. Therefore, the court must rely on plaintiffs' original briefing to attempt to discern what it is about these regulations that plaintiffs believe is unlawful. This is not an easy task because, as has been noted before, plaintiffs' original briefing often seemed to be directed toward a constitutional challenge to Title VIII of ANILCA, as opposed to a challenge to specific regulations promulgated by the Secretaries. The court has already determined that plaintiffs are barred by the statute of limitations from attacking the constitutionality of Title VIII of ANILCA on its face.[18] Despite their repeated attempts, plaintiffs simply cannot raise the issue of whether Congress validly exercised its power when it enacted Title VIII of ANILCA. After plaintiffs' arguments that have nothing to do with the challenged regulations and everything to do with an impermissible constitutional challenge to ANILCA are discarded, plaintiffs can fairly be said to be challenging the "rural preference" regulations on three grounds: 1) they are unconstitutional as applied to plaintiffs because they violate plaintiffs' rights under the Commerce Clause, 2) they are unconstitutional as applied to plaintiffs because they violate plaintiffs' right to equal protection; and 3) they are unlawful because the Secretaries exceeded their statutory authority when they promulgated the regulations because the Secretaries only had the authority to create a priority for subsistence uses and they did not have the authority to exclude certain people from using federal lands.

Plaintiffs pose the question of whether the Commerce Clause can support a regulation that excludes every non-

18. *See* Order re Motion to Dismiss (Feb. 4, 2002) at 10, Clerk's Docket No. 32.

resident hunter of the United States from hunting on federal lands in Alaska and argue that such a regulation clearly violates the Commerce Clause. What plaintiffs seem to be arguing is that the regulations prevent them from participating in interstate commerce because the non-resident plaintiffs cannot travel to Alaska to hunt and fish. Plaintiffs cite to no authority to support their contention that the challenged regulations violate the Commerce Clause, other than to cite to an opinion by this court in *McDowell v. United States,* Case No. A92-531, in which the court observed that the Commerce Clause was broad enough to support Congress' power to enact ANILCA.

Plaintiffs have conceded that hunting and fishing in Alaska substantially affects interstate commerce.[19] Congress, and by delegation the Secretaries, has the power to regulate activities that have a substantial relation to interstate commerce. *See United States v. Lopez,* 514 U.S. 549, 558-59 (1995). Plaintiffs' Commerce Clause violation argument must fail because it is based on the faulty premise that all non-resident hunters and fishers are excluded from hunting and fishing on federal public lands. The challenged regulations do not exclude every non-resident hunter of the United States from hunting on federal public lands. The regulations create a priority for subsistence uses, but once that priority is satisfied, others, including non-residents of Alaska, may hunt on federal public lands. The challenged regulations, as applied to plaintiffs, do not violate the Commerce Clause or exceed the Secretaries' delegated power to regulate hunting and fishing on federal public lands.

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19. Motion for Summary Judgment at 14, Clerk's Docket No. 86.

Appendix B

Plaintiffs next contend that regulations which deny them, as urban residents of Alaska and non-residents of Alaska, the right to subsistence hunt or fish on federal public lands in Alaska violate equal protection principles. Although plaintiffs mention both the Fifth and the Fourteenth Amendments, because plaintiffs are challenging federal regulations, their equal protection argument must be deemed brought pursuant to the Fifth Amendment.

"In determining whether the regulation violates the Fifth Amendment, we must first determine the level of scrutiny to apply." *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1277 (9th Cir. 2004). There are three levels of scrutiny: "strict scrutiny, intermediate scrutiny, or rational basis review." *Id.* "Strict scrutiny is applied when the classification is made on 'suspect' grounds such as race, ancestry, alienage, or categorizations impinging upon fundamental rights such as privacy, marriage, voting, travel, and freedom of association." *Id.* Intermediate scrutiny applies to "certain other suspect classifications, such as gender." *Id.* "When no suspect class is involved and no fundamental right is burdened, we apply a rational basis test to determine the legitimacy of the classifications." *Id.* at 1277-78.

Defendants and intervenor argue that the rational basis review standard applies here because there is no suspect classification involved and the categorization does not impinge on a fundamental right. Plaintiffs argue that strict scrutiny applies here because the regulations impinge on a fundamental right found in the Alaska state constitution and on the fundamental right to interstate travel found in the federal Constitution. Plaintiffs also argue that this is really a

racial classification because most of the people excluded from subsistence hunting and fishing are non-Natives.

Whether the regulations impinge on any fundamental right found in the Alaska constitution is irrelevant to the standard of review analysis for an equal protection claim. In determining whether a fundamental right has been impinged, the court looks to the Federal Constitution, not the state constitution. *See San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 33-34 (1973). Plaintiffs' argument that this is a racial classification also fails. The classification at issue here is not a racial classification, but one based on place of residency. In fact, Congress rejected a racial classification when it amended the original version of ANILCA which created a subsistence priority for Natives only.

"The Supreme Court has recognized a fundamental right to interstate travel." *Miller v. Reed,* 176 F.3d 1202, 1205 (9th Cir. 1999). "To infringe upon a fundamental right, the regulation must impose a penalty effecting a genuinely significant deprivation of the basic necessities of life or the denial of a fundamental political right." *Barber v. State of Hawaii,* 42 F.3d 1185, 1197 (9th Cir. 1994). The regulations, as applied to the non-residents plaintiffs, may have created a "genuinely significant deprivation" of plaintiffs' right to interstate travel. The non-resident plaintiffs had permits to hunt sheep in particular areas in Alaska and planned to travel to Alaska for that reason. When those areas were closed because of the subsistence priority for rural residents, the non-residents arguably suffered a significant deprivation of their fundamental right to interstate travel.

Assuming without deciding that strict scrutiny applies here, the court examines the regulations to see if they are narrowly tailored to serve a compelling governmental interest. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). Plaintiffs contend that any regulation that automatically deprives 90 percent of the state's population from hunting and fishing on federal lands cannot possibly withstand a strict scrutiny test.

The court disagrees. Congress clearly set out its basis for distinguishing between rural residents and non-rural residents and non-residents. In 16 U.S.C. § 3111, Congress expressly stated that

> (1) the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence;
>
> (2) the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses[.]

Protecting the physical, economic, traditional, and cultural existence of people in Alaska is a compelling governmental

issue as is "the national interest in the proper regulation, protection, and conservation of fish and wildlife on public lands in Alaska." *See* 16 U.S.C. § 3111(5). The rural preference regulations are aimed at these compelling governmental interests. The regulations are narrowly tailored because they only afford a subsistence priority to rural residents, residents who might not have other alternative food sources available. Urban residents of Alaska or non-residents of Alaska are not prevented from ever hunting and fishing on federal public lands. They may hunt and fish on federal public lands once subsistence needs are met. Because the challenged "rural preference" regulations are narrowly tailored to serve a compelling governmental interest, plaintiffs' equal protection challenge to the regulations fails.

Lastly, plaintiffs argue that the Secretaries have exceeded their statutory authority because the regulations make no attempt to protect fish and game stocks but instead create a rural preference. Plaintiffs insist that Title VIII of ANILCA requires the Secretaries to determine the extent of the resources first and then to set a priority of uses. Plaintiffs contend that all the Secretaries have done with the "rural preference" regulations is exclude users.

This argument is meritless because the statute itself establishes a rural preference. Title VIII of ANILCA provides that "the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes." 16 U.S.C. § 3114. "Subsistence uses" are defined as "the customary and traditional uses by *rural* Alaska

residents of wild, renewable resources. . . ." 16 U.S.C. § 3113 (emphasis added). Furthermore, Congress found that

> the continuation of the opportunity for subsistence uses by *rural* residents of Alaska, including both Native and non-Natives, on public lands . . . is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence.

16 U.S.C. § 3111 (emphasis added). The Secretaries were then delegated the authority to promulgate regulations to implement ANILCA. 16 U.S.C. § 3124. In doing so, the Secretaries did not invent the need for a rural preference for subsistence hunting and fishing. The statute dictated that the subsistence priority be afforded to rural residents. The Secretaries have not exceeded their statutory authority by promulgating regulations that exclude non-rural residents and non-residents of Alaska from participating in *subsistence* hunting and fishing on federal public lands.

Conclusion

Plaintiffs' motion for summary judgment is denied. Defendants' and intervenor's motions for summary judgment are granted. Plaintiffs' second amended complaint is dismissed with prejudice. The clerk of court shall enter judgment accordingly.

Appendix B

DATED at Anchorage, Alaska, this 16 day of August, 2005.

s/ H. Russel Holland, Judge
H. Russel Holland, Judge
District of Alaska

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA FILED MARCH 4, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

No. A00-0167-CV (HRH)

THE ALASKA CONSTITUTIONAL LEGAL DEFENSE CONSERVATION FUND, INC. et al.,

Plaintiffs,

vs.

GALE NORTON, Secretary of the Interior, et al.,

Defendants.

ORDER

Motion to Accept Amended Complaint

Plaintiffs have filed a motion to accept their amended complaint.[1] Defendants and intervenor oppose the motion.[2] Oral argument has not been requested and is not deemed necessary.

FACTS

Plaintiffs' original complaint[3] seeking declaratory and injunctive relief alleged four causes of action in relation to

1. Clerk's Docket No. 47.

2. Clerk's Docket Nos. 49, 50.

3. Clerk's Docket No. 1.

the Alaska National-Interest Lands Conservation Act (ANILCA): (1) violations of the Equal Footing Doctrine, the Submerged Lands Act, and the Statehood Compact;[4] (2) violations of the Tenth Amendment of the Constitution and the Enumerated Powers Doctrine;[5] (3) a violation of the Fourteenth Amendment of the Constitution;[6] and (4) a violation of the Administrative Procedure Act (APA).[7] By order dated February 4, 2002, this court dismissed three of plaintiffs' four causes of action: Counts One, Two, and Four.[8] Count Three was also dismissed except to the extent that it presented an "as-applied" challenge to ANILCA.

The order of February 4, 2002, also dismissed without prejudice the lead plaintiff, Alaska Constitutional Legal Defense Conservation Fund, Inc. (ACLDCF), for lack of standing. Leave to amend was granted by this court so that plaintiffs might show sufficient injury to ACLDCF to satisfy the requirements of standing.

On June 3, 2002, this court entered an order as a result of the status conference of May 29, 2002.[9] In that order, the court tentatively held that this case is one that raises issues which should be addressed under the APA. 5 U.S.C. §§ 701-

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4. *Id.* at 13-14.

5. *Id.* at 14-16.

6. *Id.* at 16-17.

7. *Id.* at 17-18.

8. Clerk's Docket No. 32.

9. Clerk's Docket No. 42.

706. Plaintiffs were granted until September 30, 2002, to file a motion to amend their complaint and the amended complaint. This court requested that plaintiffs address in their amendment both the question of whether or not ACLDCF had standing and which administrative actions would be the focus of this case.

At the request of plaintiffs, the September 30, 2002, deadline was extended to October 30, 2002.[10] Plaintiffs filed their amended complaint on October 30, 2002,[11] without the predicate motion to amend. After notice by this court given November 5, 2002, plaintiffs filed their motion to amend on November 6, 2002.[12]

The amended complaint sets forth four counts: (1) the regulations of ANILCA unconstitutionally discriminate, violations of the Fifth and Fourteenth Amendments;[13] (2) a violation of the Administrative Procedure Act;[14] (3) a violation of the Public Trust Doctrine;[15] (4) claims specific

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10. Clerk's Docket Nos. 43, 44.

11. Clerk's Docket No. 45. The court notes that when presented to the clerk's office, the amended complaint was filed and docketed at Clerk's Docket No. 45. However, the amended complaint was thereafter stricken from the docket *(see* Minute Order (Nov. 5, 2002), Clerk's Docket No. 46), and has since been treated as a lodged document.

12. Clerk's Docket Nos. 46, 47.

13. Amended Complaint at 10-14.

14. *Id.* at 14-16.

15. *Id.* at 16-19.

to the Alaska Constitutional Legal Defense Conservation Fund.[16]

DISCUSSION

Under Rule 15 (a) , Federal Rules of Civil Procedure, "leave shall be freely given [to amend] when justice so requires."[17] In the Ninth Circuit, "Rule 15's policy of favoring amendments to pleadings should be applied with 'extreme liberality.'" *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981) (*citing Rosenberg Brothers & Co. v. Arnold*, 283 F.2d 406 (9th Cir. 1960) (per curiam)).

Defendants and intervenor request that this court deny plaintiffs' motion to amend, contending that the proposed amendments are futile. *See Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 772 (9th Cir. 1991) (explaining that the court may deny leave to amend if the amendment is futile). Furthermore, they argue that plaintiffs are trying to reinstate claims previously dismissed by this court. *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993) ("[A] court is generally precluded from reconsidering an issue :hat has already been decided by the same court, or a higher court in the identical case."); *see also Kasey v. Molybdenum Corp. of America*, 467 F.2d 1284, 1285 (9th Cir. 1972) ("[A]mendments should lot be allowed merely to permit a

16. *Id.* at 20-21.

17. Rule 15(a) states in pertinent part:

> [A] party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

restatement of the same facts in different language or the reassertion of a claim previously determined.")

Count One

The Regulations of ANILCA Unconstitutionally Discriminate— Violations of the Fifth and Fourteenth Amendments

Intervenor calls into question plaintiffs' contention that they have a claim based on the Fourteenth Amendment. This court previously determined that any claim based on the Fourteenth Amendment applies to the actions of states, not actions by the federal government.[18]

Plaintiffs concede this point and respond that to the extent that Count One addresses the Fourteenth Amendment, it should be treated as applicable to the State of Alaska. The State of Alaska is not a party to this case. Plaintiffs' Fourteenth Amendment allegations must be deleted. Beyond this point, plaintiffs' Count One may state a claim that regulations under ANILCA are unconstitutional as applied to the plaintiffs.

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18. Order re Motion to Dismiss at 8 (Feb. 4, 2002), Clerk's Docket 32.

Appendix C

Count Two

Violation of the Administrative Procedure Act

Both defendants and intervenor object to the amended Count Two as a new version of the previously dismissed Count Four which was based on the Administrative Procedure Act.[19] Plaintiffs' amended complaint includes a completely rewritten APA claim. As rewritten, it bears little resemblance to the original complaint's Count Four. According to plaintiffs, this court reinstated the APA claim in its June 3, 2002, order.

Plaintiffs have substantially misunderstood what the court intended to flow from a status conference held in May of 2002 and the order of June 3, 2002, which followed.[20] As a result of that conference, the court expected that plaintiffs would become better informed as a result of examining defendants' public files as regards their claims that ANILCA regulations were invalid as applied, that plaintiffs would move to amend (which plaintiffs have now done), and that the amended complaint would take the form of a challenge to specific actions of the defendants pursuant to the APA. The court did not, as alleged at paragraph 35 of the amended complaint, reinstate plaintiffs' APA count.[21] The APA is a vehicle for bringing the substance of plaintiffs' amended

19. *See* Order re Motion to Dismiss at 13 (Feb. 4, 2002), Clerk's Docket No. 32.

20. Clerk's Docket No. 42.

21. Amended Complaint at 15.

Count One before the court. Counts One and Two of the amended complaint should be melded.

Both defendants and intervenor are concerned that plaintiffs are renewing a claim for tort damages under the Federal Tort Claims Act, a claim that was previously disavowed.[22] Plaintiffs, in their reply, state that Jacobson is not seeking damages under the Federal Tort Claims Act.[23] The court takes plaintiffs at their word. The amended complaint does not and will not be deemed to include a claim against the defendants which would be subject to the Federal Tort Claims Act.

Count Three

The Public Trust Doctrine

Plaintiffs reallege a violation of the Public Trust Doctrine, formerly dismissed by this court in its February 4, 2002, order.[24]

Plaintiffs argue that the State of Alaska violated the Public Trust Doctrine by not "challenging the [ANILCA] regulations on a[n] equal protection basis; by allowing the regulations to discriminate on the basis of residency,

22. Plaintiffs' Opposition to Motion to Dismiss at 21, Clerk's Docket No. 26.

23. Plaintiffs' Reply to Opposition to Motion to Amend at 6, Clerk's Docket No. 52.

24. Order re Motion to Dismiss at 8 (Feb. 4, 2002), Clerk's Docket 32.

prescription and alienation of resources; and by failing to challenge the regulations on the basis of the Tenth Amendment."[25] These arguments are meritless inasmuch as the State of Alaska is not a party to this case.

Conceding that the Public Trust Doctrine is currently applicable only to the State of Alaska, plaintiffs next argue that the doctrine could be expanded—by this litigation—to include the federal government.[26] As support for the renewal of this claim, plaintiffs have included a copy of the publication, *Putting the Public Trust Doctrine to Work*, as an exhibit.[27] According to plaintiffs, this publication supports their contention that the Public Trust Doctrine includes certain activities pertaining to the federal government.

The court perceives nothing in the publication which supports an action against the federal government under the Public Trust Doctrine. The exhibit is incomplete and is apparently some kind of catalog of how certain land cases are treated in various jurisdictions.

The court still perceives no legal basis for a public trust cause of action against the federal government. This court

25. Amended Complaint at 17. Plaintiffs also include claims based on violations of the Equal Footing Doctrine, the Submerged Lands Act, and the Common Use Clause—all claims previously dismissed by this court. See Order re Motion to Dismiss at 5-8 (Feb. 4, 2002), Clerk's Docket 32.

26. Plaintiffs' Reply to Opposition to Motion to Amend at 5, Clerk's Docket No. 52.

27. *Putting the Public Trust Doctrine to Work*, attached as Exhibit 21 to Amended Complaint.

previously noted that plaintiffs had not provided any authority to support an action against the federal government under the Public Trust Doctrine, and plaintiffs still have failed to provide that authority.

Because the State of Alaska has allegedly violated the Public Trust Doctrine by not suing the federal government, plaintiffs assert third-party standing. This court did note in its previous order that in narrowly tailored circumstances a litigant may be permitted to bring an action on behalf of a third party.[28] However, the only authority plaintiffs cite is the case of *Alaskans for a Common Language v. Kritz*, 3 P.3d 906 (Alaska 2000), in which the court allowed the intervention of a third party when it was established that the State of Alaska was not sufficiently protecting the third party's fundamental rights.

Kritz deals with intervention during ongoing litigation; *Kritz* was not about establishing third-party standing. Moreover, plaintiffs themselves have sued the State of Alaska as to the matter at hand. *Alaska Constitutional Legal Defense Conservation Fund, Inc. v. Knowles*, No. 3AN-01-10316. Although it is not entirely clear, the court infers that the state court case has been resolved, for plaintiffs relate that the Alaska Supreme Court found that the "litigation decision" by the Governor was a political choice and not subject to the Court's jurisdiction.

Plaintiffs still have not shown that they have standing to assert a public trust claim on behalf of the State of Alaska. Plaintiffs must delete Count Three from their amended complaint.

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28. Order re Motion to Dismiss at 7 (Feb. 4, 2002), Clerk's Docket 32.

Appendix C

Count Four

Claims Specific to Alaska Constitutional Legal Defense Conservation Fund

This court previously dismissed ACLDCF as a plaintiff, with leave to amend. ACLDCF did not properly allege that it was a member organization or that it was suing on behalf of its members.[29] Count Four is ACLDCF's attempt at remedying its lack of standing.

Defendants contend that, Count Four should not be a separate claim. There are no allegations being made against defendants on Count Four; rather, it only contains a description of ACLDCF's purpose and injuries it may suffer or have suffered.

Plaintiffs' Count Four does not state a separate legal wrong or cause of action. ACLDCF's standing allegations should set forth with the rest of plaintiffs' standing allegations, in the beginning of the amended complaint.

Other Matters

Defendants may still question the adequacy of ACLDCF's standing allegations, but they do not support that contention at this time.[30]

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29. Order re Motion to Dismiss at 14 (Feb. 4, 2002), Clerk's Docket 32.

30. ACLDCF has alleged that it is a membership organization, ____ ACLDCF still has not confirmed that it is suing on behalf of its members, or that ACLDCF was injured as a corporation. In filing a ____ised, amended complaint, plaintiffs must fully evaluate and plead ____ basis for their standing to sue.

Appendix C

The parties debate the purpose and efficacy of plaintiffs' actual allegations concerning Warren Olson's denial of subsistence permits.[31] Plaintiffs assert that Olson is not seeking review of another administrative decision denying him a subsistence permit. Rather, Olson's allegations are to provide a basis for the argument that ANILCA regulations as-applied are unconstitutional, and that Olson will continue to be denied a hunting permit in Wrangell-St. Elias National Park, because of this as-applied discrimination.

The Olson allegations are not set forth as a separate cause of action in plaintiffs' complaint. Whether or not the Olson matter is relevant to plaintiffs' challenge to the application of defendants' regulations goes to the merits of plaintiffs' claims, not the adequacy of plaintiffs' amended complaint.

According to defendants, plaintiffs appear to be contesting temporary subsistence management regulations in 1990, 55 Fed. Reg. 27114-170 (June 29, 1990).[32] These temporary regulations were replaced by final regulations, 57 Fed. Reg. 22530-567 (May 28, 1992). Plaintiffs respond by stating that they intended to challenge the final 1992 regulations and are sorry for the confusion. Plaintiffs shall clarify this point in filing a revised, amended complaint.

Finally, defendants are concerned that plaintiffs are attempting a facial challenge of ANILCA through the guise of challenging the regulations. Plaintiffs respond by stating that they are not facially challenging ANILCA, but rather

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31. Amended Complaint at 4.

32. *Id.* at 8, ¶¶ 18-19, ¶ 28.

they are contesting the enforcement of ANILCA through regulation. Here, also, plaintiffs shall make the foregoing point clear and express in their revised, amended complaint.

CONCLUSION

Plaintiffs' amended complaint which is presently lodged with the court[33] may not be filed. It must be revised to state plainly and concisely how and why particular regulations of the defendants are unlawful as applied. Plaintiffs' complaint is encumbered by bulky exhibits which are neither necessary nor useful to the statement of plaintiffs' claim. The case must be developed from the certified administrative record. To this end, plaintiffs must, in reviewing their complaint, detail (by date and subject matter) what agency actions are being challenged. Plaintiffs' revised amended complaint shall be served and filed on or before March 28, 2003.

DATED at Anchorage, Alaska, this 3 day of February, 2002.

s/ H. Russel Holland
H. Russel Holland
United States District Judge

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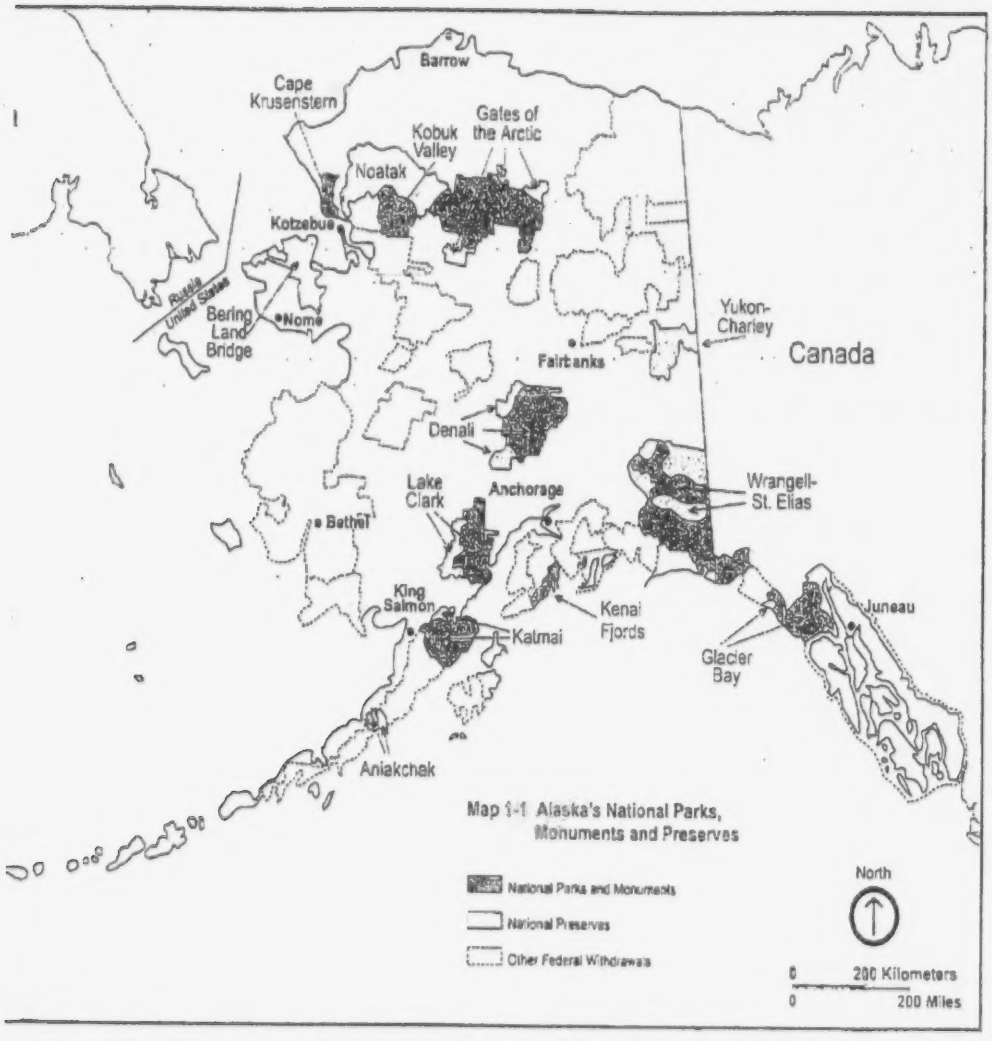
33. *See* Minute Order (Nov. 5, 2002), Clerk's Docket No. 46.

APPENDIX D — MAP. ALASKA'S NATIONAL PARKS, MONUMENTS AND PRESERVES, NORRIS "ALASKA SUBSISTENCE, PAGE 1-1, (NATIONAL PARK SERVICE, 2004)



Page 1 – Norris "Alaska Subsistence" (National Park Service, 2004)

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